LIBRARY
PREME COURT. U. S.

APR 17 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1157

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

TOM M. DAVIS
Counsel for Respondent
1600 Esperson Building
Houston, Texas 77002

Of Counsel:

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Involved	2
Statement	2
Reasons for Not Granting the Writ	2
Conclusion	6

LIST OF AUTHORITIES

Austin Road Co. v. Pope, 216 S.W.2d 563 (Tex. 1949)	4
Chicago & N.W. Ry. v. Chicago, Rock Island & P. Ry., 179 F.Supp. 33 (D.C., Iowa, 1959), affirmed 280 F.2d 110, cert. den'd 364 U.S. 931, 81 S.Ct. 378 (1961)	3
Ft. Worth & Denver Ry. v. Threadgill, 228 F.2d 307 (5th Cir., 1955)	4
Humble Oil & Refining Co. v. Martin, 222 S.W.2d 995 (Tex. 1949)	4
Wheeler v. Glazer, 153 S.W.2d 449 (Tex. 1941)	4

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1157

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

OPINION BELOW

The opinion of the Texas Court of Civil Appeals (Appendix B of Petition) is reported at 430 S.W. 2d 900. The Supreme Court of Texas "refused as presenting no error requiring reversal" Petitioner's application for writ of error on November 20, 1968 and overruled Petitioner's motion for rehearing on January 22, 1969. (Appendix E of Petition.)

JURISDICTION

Petitioner seeks to invoke jurisdiction under 28 U.S.C. § 1257(3). Respondent asserts herein that no federal question is presented.

QUESTIONS INVOLVED

1. The case presents no federal question within the jurisdiction of this Honorable Court.

2. The judgment of the Texas Court of Civil Appeals correctly applied a well-settled Texas rule of indemnity.

STATEMENT

The statement by Petitioner (pp. 3-4) is substantially correct and we will not extend this brief by repetition. However, we emphasize that the Courts below found Petitioner negligent in creating the brake defect in question and in failing to discover the defect and correct it before delivery to Respondent. (Tr. 43) Moreover, it was established that Respondent had made a proper inspection of the brake in question. (Tr. 43)

REASONS FOR NOT GRANTING THE WRIT

1. *The case presents no federal question.* Under the guise that a construction of the Safety Appliance Act is involved Petitioner seeks to create the illusion that there is a jurisdictional basis for certiorari in this case. This is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous.

This case does not involve a construction or an application of the Safety Appliance Act. It simply involves the question of whether under Texas law Respondent was under principles of tort law entitled to indemnity for the amount paid its employee in a settlement situation in which:

(1) Petitioner's repair forces rendered a freight car brake non-operative and negligently failed to discover its condition before delivering the car to Respondent.

(2) Respondent without knowledge of the defect and after proper inspection switched the car without negligence but in technical violation of the Safety Appliance Act.

(3) Respondent's employee Liles sustained serious injury due to the defective brake and thereafter entered into a fair and reasonable settlement with Respondent after Petitioner's refusal to participate on any basis.

Respondent's case is patterned on the guidelines established by the landmark case of *Chicago & N.W. Ry.* v. *Chicago, Rock Island & P. Ry.*, 179 F. Supp. 33 (D.C., Iowa 1959), affirmed 280 F. 2d 110 (8th Cir., 1960). (Hereinafter referred to as *Rock Island.*)

Rock Island was identical in principle to the case at hand but resulted in an award of contribution instead of indemnity because:

(1) In *Rock Island* the receiving carrier was found guilty of improper inspection. Here Respondent was found to have made a proper inspection and was acquitted of common law negligence.

(2) Under Iowa law in *Rock Island* the fact findings dictated the allowance of contribution whereas here under Texas law the fact findings dictate the allowance of full indemnity.

In *Rock Island* both parties petitioned this Honorable Court for certiorari. Both petitions were denied. 364 U.S. 931, 81 S. Ct. 378 (Causes 491 and 525) (1961).

In approaching the question of whether indemnity or contribution would lie in *Rock Island* the lower court referred to the well-settled rule that local state law as distinguished from federal law controlled:

> "It is well settled that the law of the place of the commission of the tort which gives rise to a claim for indemnity or contribution is the applicable law. * * * It seems clear that even though liability was bottomed on and existed because of the Federal Employers' Liability Act, the right to indemnity or contribution is nevertheless governed by the applicable state law. Ft. Worth & Denver Railway Co. v. Threadgill, 5th Cir., 1955, 228 F. 2d 307, 312." 179 F. Supp. 33, 39.

In *Threadgill* the Court said:

> "The railroad's right to indemnity or to contribution, which it seeks in the alternative, is determined by state law." 228 F. 2d 307, 312.

2. *The Texas Court of Civil Appeals correctly applied a well-settled rule of indemnity law formulated by the Supreme Court of Texas in joint tortfeasor situations.* *Humble Oil & Refining Co.* v. *Martin,* 222 S.W. 2d 995 (Tex. 1949); *Austin Road Co.* v. *Pope,* 216 S.W. 2d 563 (Tex. 1949); and *Wheeler* v. *Glazer,* 153 S.W. 2d 449 (Tex. 1941). In the *Threadgill* case, cited above, the Court of Appeals for the Fifth Circuit summarized the test involved:

> "Under Texas law, the right of one tortfeasor to indemnity from another is not now determinable by the old test of misfeasance and non-feasance, but instead turns upon the issue of whether one of the defendants breached a duty of care owed by him to another defendant, in addition to or co-existent with his primary duty owed to the plaintiff." 228 F. 2d 307, 312.

In the case at hand the Courts below agree that indemnity should lie under this test. Justice requires such a conclusion when the record establishes that:

1. Petitioner negligently created the insiduous brake defect in its own car during repairs at its shop in Palestine,

Texas. In so doing it created a trap which almost caused the death of an innocent switchman and which could have caused injury or death to other employees of Respondent as well as serious damage to the property of Respondent and to the persons and property of members of the public. (Tr. 43)

2. Petitioner negligently failed by proper inspection to discover and correct the defect even though it used the car in violation of the Safety Appliance Act for about two weeks prior to the accident. (Tr. 43) In the dark of night it delivered the car to Respondent knowing that the car would be switched and hauled by Respondent's employees on Respondent's lines.

3. Respondent made a proper inspection of the car, exercised due care in picking it up from Petitioner and in switching it during the few minutes it had possession before the accident. (Tr. 43)

Under the undisputed facts Petitioner most certainly violated duties owed to Respondent's employee and to Respondent which proximately caused their respective damages and while it can be said that Respondent under the Safety Appliance Act violated a rule owed to its employee Liles by briefly hauling a car equipped with a defective hand brake on its line, Respondent did not violate any duty owed to Petitioner. Hence under Texas law Respondent was entitled to full indemnity.

We will not extend this brief by reply to the so-called "public policy" arguments advanced by Petitioner. It is anomalous that Petitioner should place great emphasis on the brief technical violation (a few minutes) by Respondent of the Safety Appliance Act when in fact Petitioner had itself just completed about two weeks' violation of the Act, undetected by its own inspectors and by the Interstate

Commerce Commission. Petitioner's suggestion that the holding here would result in endless delay in the settlement of valid personal injury claims under the Safety Appliance Act has no foundation. The record in this case is to the contrary. Respondent followed not only a just course but also a prudent course and settled with its employee without litigation. *It was not until this had been accomplished that Respondent pursued its remedy at law against Petitioner.* The result reached here is a just one and should not be disturbed. To do so would allow Petitioner, *the creator of the defective brake,* to "escape scot-free".

CONCLUSION

The petition for writ of certiorari should not be granted. This case does not involve a federal question and the Courts below have accurately and justly applied prevailing principles of Texas law.

.....

TOM M. DAVIS
Counsel for Respondent

CERTIFICATE OF SERVICE

Copies of this Brief in Opposition have been forwarded to Mr. Ben G. Sewell, Attorney for Petitioner, this 15 day of April, 1969.